Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	)	
	)	
NATIONWIDE PROGRAMMATIC	)	**WT Docket No. 03-128**
AGREEMENT REGARDING THE	)	
SECTION 106 NATIONAL HISTORIC	)	
PRESERVATION ACT REVIEW PROCESS	)	
	)	
	)	

Comments of the
United South and Eastern Tribes, Inc.
And its Member Tribes:

Eastern Band of Cherokee, Mississippi Band of Choctaw, Miccosukee Tribe of Florida, Seminole Tribe of Florida, Chitimacha Tribe of Louisiana, Seneca Nation of Indians, Coushatta Tribe of Louisiana, St. Regis Band of Mohawk Indians, Penobscot Indian Nation, Passamaquoddy Tribe – Indian Township, Passmaquoddy Tribe – Pleasant Point, Houlton Band of Maliseet Indians, Tunica-Biloxi Indians of Louisiana, Poarch Band of Creek Indians, Narragansett Indian Tribe, Mashantucket Pequot Tribe, Wampanoag Tribe of Gay Head (Aquinnah), Alabama-Coushatta Tribe of Texas, Oneida Indian Nation, Aroostook Band of Micmac Indians, Catawba Indian Nation, Jena Band of Choctaw Indians, Mohegan Tribe of Connecticut, Cayuga Nation

In response to the
Notice of Proposed Rulemaking

August 8, 2003

I. INTRODUCTION

The United South and Eastern Tribes, Inc. (USET) is an inter-tribal organization consisting of 24 tribes from Maine to Texas. USET appreciates the opportunity to submit these comments on the proposed draft "Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission." For organizational purposes, Part I of these comments provides an historical context for tribal consultation; Part II sets forth the legal framework for tribal consultation; Part III discusses significant court decisions regarding tribal consultation under the National Historic Preservation Act; and Part IV provides a

detailed review of the draft Nationwide Programmatic Agreement (draft NPA) with comments regarding specific sections.

These comments reflect the views of USET and its member tribes. A number of USET tribes will be submitting separate comments endorsing these comments, as well as setting forth concerns unique to their circumstances.

Since 1492, Indian tribes within what is now the United States have, as a group, lost 98% of their aboriginal land base. This percentage is even higher for the member tribes of USET, whose aboriginal lands were the first to be subsumed in the process of European settlement. Today, as a result, the overwhelming majority of tribal properties of cultural and religious significance are located off Indian Reservations and Federal trust lands. The National Historic Preservation Act (NHPA) recognizes the validity of continuing tribal concerns with the protection of both on- and off-Reservation properties of cultural and religious significance, and establishes extensive Federal agency Consultation requirements with tribes when there is a "Federal Undertaking," as defined in the National Historic Preservation Act, [1] with the potential to have any affect on such properties. In the case of wireless communication towers and tenant array sitings, that responsibility to consult resides with the Federal Communications Commission (FCC), in its capacity as permitter of the transmission frequencies. USET tribes do not and will not engage in government-to-government consultation with private entities, such as the licensees.

As sovereign nations, Indian tribes have an inherent right and responsibility to protect and promote the welfare of their people, which includes the right to protect their cultural and religious properties and the right to be treated with respect by Federal agencies. Federal law acknowledges these rights, but Federal agencies have been reluctant to comply. For several years, USET has been very concerned about the failure of the FCC to comply with Federal law when it comes to consulting with tribal governments before cell towers are constructed. However, in recent months, USET has been involved in detailed discussions with FCC officials and is very hopeful that a turning point has been reached on these issues.

Historical Context of Cell Tower Construction and Indian Tribes. Despite federally mandated consultation requirements, literally tens of thousands of cell towers have been constructed across the United States with virtually no effort by the FCC to consult with tribes. A number of these towers have had an adverse impact on sites of religious and cultural importance to tribes. In a belated attempt to make up for past errors, the FCC at one point stated that it had delegated its consultation obligations to the

[1] A Federal "Undertaking" means "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including – (A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and, (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 16 U.S.C. 470w(7).

cell tower companies, who subsequently began sending letters to tribes demanding information, some of it very sensitive in nature, and asserting that if the information was not provided within a certain timeframe, usually 10 to 30 days, as one typical letter to the Chitimacha Tribe of Louisiana put it, "[w]e will presume that a lack of response from the Chitimacha Tribe of Louisiana to this letter will indicate that the Chitimacha Tribe of Louisiana has concluded that the particular project is not likely to affect sacred tribal resources." In the last year, many tribes have received hundreds, and even thousands of these letters. To add insult to injury, the letters frequently refer to the tribes as "organizations" or "groups" demonstrating a lack of respect for tribal sovereignty, ignorance of the status of tribes and their unique legal rights, and generally conveying an impression that these companies do not care about tribal views. The Tribal Historic Preservation Officer for the Mississippi Band of Choctaw Indians, Kenneth H. Carleton has noted that the Mississippi Band had received "a minimum of over 1,000 requests" from cell tower companies, many providing virtually no information on the location of the sites or maps, but all with at least a check off saying that there are no sites of religious or cultural importance to the tribe to make it easy to for tribes to "rubber stamp their requests!"

Tribal Costs in Providing Services and Information to Cell Tower Companies are Substantial. Despite the onerous workload involved in responding to these letters, the cell tower companies, which stand to make great profits from these towers, have with few exceptions, been unwilling to pay fees to cover tribal costs. They argue that tribes should provide this information as a free government service. Of course, it is common for Federal agencies, including the FCC, to charge reasonable fees for its services. Without a tribe's unique expertise in its cultural and religious history, it is impossible for cell tower companies to properly evaluate the historic significance of a proposed Facility, or its potential impact on, properties of cultural and religious significance to tribes. Accessing this tribal expertise to benefit a commercial enterprise is a wholly separate issue from a tribe invoking its right to consult with the FCC.

Some cell tower companies want tribes to provide this information for free. However, others have recognized the value of access to tribal expertise and, as with their other consultants, pay appropriate fees. These exceptions are worth noting, as they demonstrate that it is both possible and practical to establish a process involving tribes and cell tower companies which addresses tribal concerns, meets the economic needs of the cell tower companies, and preserves the consultation obligation of the FCC. For example, the Seminole Tribe of Florida developed a professional relationship with a number of cell tower companies whereby for appropriate fees, the Seminole Tribe is able to respond in a timely manner to the requests of those companies. The process works smoothly in great part because the companies know, in advance, exactly what kind of information the Tribe needs to be able to respond. Similarly, the Narragansett Tribe has worked out an effective process with cell tower companies in Rhode Island, but has met with opposition from cell tower companies in Massachusetts and Connecticut. The success stories are the exception. By and large, cell tower companies need tribal expertise to properly evaluate commercial cell tower sites, but have refused to pay for that expertise. At the same time, the FCC has an independent obligation to consult with

tribes in order to meet its legal responsibilities. Meanwhile the tribes, who are generally financially strapped, fear the continuing loss, damage or destruction of tribal cultural properties as communications towers proliferate.[2]

USET-Industry Negotiations. Almost two years ago, USET entered into detailed negotiations with a communications industry association to develop a process for addressing these issues that worked for both industry and tribes. USET recognizes that the construction of a universal wireless telecommunications infrastructure network is vital to the economic and social future of the United States. However, the tribal interests at issue are also vital, both to the tribes, and to the United States in terms of its historic preservation goals and its national identity as a nation of diverse and vibrant peoples and cultures. USET worked hard to find pragmatic solutions, while still assuring respect for tribal sovereignty and maintaining the FCC's ultimate consultation responsibility. Based on the negotiations, USET developed and sent to the industry group a set of protocols. We waited many months for a response, and then were told that the industry group had no further interest in these negotiations.

This experience tells us that it is vital that the FCC participate in any process that will assure that the tribal voice is heard. USET knows, from other Section 106 negotiations, that tribal concerns can be addressed without undermining the mission of a federal agency. For example, USET tribes have successfully negotiated a Memorandum of Agreement with the Mississippi National Guard which, among other things, protects a tribal sacred site in the middle of a tank training range. Both sides made compromises to ensure that the vital interests of both could be protected. Similarly, the Louisiana tribes have a memorandum of agreement with the Louisiana National Guard. When an issue arose regarding rerouting a dangerous road at Camp Beauregard through an archeological site, the Louisiana Indian tribes worked with the Louisiana National Guard to permit the rerouting after appropriate archeological excavation and mitigation was undertaken. Tribes are not irrational; they have the same interests and concerns as do other communities. They want to build a solid working relationship with industry to assure that everybody's interests are given due regard.

II. LEGAL CONTEXT FOR FEDERAL CONSULTATION WITH TRIBES AND THE PROTECTION OF TRIBAL SACRED SITES

A. National Historic Preservation Act

The National Historic Preservation Act (NHPA) provides protection for "districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering, and culture." *16 U.S.C. Section 440(f)*. The NHPA does this by requiring federal agencies engaged in a "federal undertaking" to "take into account the effect" the undertaking may have on historic properties "included", or "eligible for inclusion" in the National Register of Historic Places. *Id*. The NHPA is implemented through a complex regulatory scheme (the Section 106 process), a consultation process

[2] One of the cruel ironies of this situation is that cell tower companies and many tribes tend to value the same place: high points in the landscape.

through which federal agencies collect information concerning a particular site's eligibility for the National Register, potential adverse effects the undertaking may have on the site, and ways to mitigate adverse effects. *See 34 C.F.R. Part 800*.

The NHPA has always required consultation with tribes, but in 1992 it was specifically amended to clarify and mandate such consultation. The 1992 amendments state that federal agencies "shall consult with any Indian tribe and Native Hawaiian organization that attaches religious or cultural significance" to properties that might be affected by a federal undertaking. 16 U.S.C. Section 470a(d)(6)(B) (emphasis added). The FCC licensing process for cell tower antenna arrays is a federal undertaking.

The NHPA tribal consultation requirement applies broadly to traditional religious and cultural properties of Native Americans and Native Hawaiians, and makes no distinction with respect to tribal religious or cultural properties located on or off tribal lands. The law does not provide for delegation of this responsibility to private entities, such as cell tower companies.

B. General Principles Of Federal Indian Law Recognize Tribal Sovereignty, Place Tribal-US Relations In A Government-To-Government Framework, And Establish A Federal Trust Responsibility To Indian Tribes.

These general principles are rooted in the U.S. Constitution (Art. I, Section 8), Federal case law, Federal statutes (including the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, and the Archaeological Resources Protection Act), Presidential Executive Orders (including Executive Order 13007—Indian Sacred Sites, and Executive Order 13175—Consultation and Coordination with Indian Tribal Governments), regulations, and case law, as well as in the policy statement of the Advisory Council on Historic Preservation entitled *The Council's Relationship with Indian Tribes*.

(1) Federal Statutory Consultation Obligations with Indian Tribes on Religious Matters. Congressional Indian policy with respect to Indian religious matters is set forth in the American Indian Religious Freedom Act (AIRFA):[3]

"Protection and preservation of traditional religions of Native Americans

> Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

[3] Pub. L. No. 95-341, Section 1, 92 Stat. 469 (1978)(codified at 42 U.S.C. Section 1996 (1988).

42 U.S.C. Section 1996. AIRFA also requires federal agencies to consult with Native American traditional religious leaders in order to evaluate existing policies and procedures and make changes necessary to preserve Native American cultural practices. Act of Aug. 11, 1978, P.L. 95-341, Section 2. 92 Stat. 470.

There are several other statutes where Congress has set forth a policy of protecting traditional Indian religion, such as the Native American Graves Protection and Repatriation Act (NAGPRA),[4] the Archaeological Resources Protection Act (ARPA),[5] and the National Museum of the American Indian Act (20 U.S.C. Sections 80q to 80q-15). The consultation requirements of, and legal rights established by, these statutes are not geographically confined to situations where cultural or religious objects are found (or activities occur) solely on tribal lands.

(2) Executive Action. There are several presidential orders that mandate Federal consultation with Indian tribes. Executive Order 13007 (May, 24 1996) (hereafter "Executive Order on Sacred Sites") directs federal agencies to provide access to American Indian sacred sites, to protect the physical integrity of such sites and, where appropriate, to maintain the confidentiality of these sites. This Executive Order on Sacred Sites also incorporates a prior Executive Memorandum issued on April 29, 1994, which directed federal agencies to establish policies and procedures for dealing with Native American Tribal Governments on a "government-to-government basis."

Executive Order 13175 (Consultation and Coordination with Indian Tribes, November 6, 2000) directs Federal officials to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.

(3) Federal Communications Commission Policy Statement. The Commission has adopted a policy which sets forth these basic principles of Federal Indian law with great clarity. USET applauds the inclusion of substantial portions of this policy statement in the "Whereas" clauses of the draft NPA.

(4) Federal Court Interpretation of Indian-Related Statutes. The Federal Courts have developed canons of construction that are used to interpret Indian treaties and statutes relating to Indians. The fundamental component of these canons of construction is that treaties and statutes are to be liberally interpreted to accomplish their protective purposes, with any ambiguities to be resolved in the favor of the Indian tribes or individual Indians. See *Alaska Pacific Fisheries Co. V. United States*, 248 U.S. 78, 89 (1918) ("the general rule [is] that statutes passed for the benefit of the dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164 (1973). In this

[4] Pub. L. No. 101-601, Section 2, 104 Stat. 3048 (1990)(codified at 25 U.S.C. Sections 3001-13 (Supp. III 1991).

[5] Pub. L. No. 96-95, Section 2, 93 Stat. 721 (1979)(codified at 16 U.S.C. Sections 470aa-70mm (1988).

context, the National Historic Preservation Act should be read broadly to support and protect tribal interests.

There has been an effort from some quarters to cloud the consultation right by asserting that the tribal right to consultation is not as strong off tribal lands as on tribal lands. This argument ignores the fact that Congress, in providing in the National Historic Preservation Act that federal agencies "shall consult" with Indian tribes regarding their properties of cultural and historic importance, created no distinction between off and on-reservation sites. It also ignores the numerous instances where Congress has acted to provide tribes with jurisdictional and other rights off tribal lands in conformity with the "overriding duty of [the] Federal government to deal fairly with Indians wherever located . . . ." *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). Within this legal framework, the authority of the Tribal Historic Preservation Officer is a creature of federal statute NHPA, Section (101(d)(2)(3). The federally created Tribal Historic Preservation Officer arguably only has jurisdiction over tribal lands. Nonetheless, this limitation does not affect the tribes' right to be consulted with regard to tribal cultural and religious properties located off of tribal lands. A tribe may designate the federally created Tribal Historic Preservation Officer as the tribe's representative for the off-reservation sites.

C. The FCC's Consultation Obligation is an "inherent Federal" Function.

The FCC's consultation obligation is an "inherent Federal" or "inherently Governmental" function that is non-delegable. If the FCC were to delegate this function to the cell tower companies such action would violate the principle of separation of powers founded in the Constitution. The U.S. Constitution provides that "[t]he executive power shall be vested in a President of the United States of America," and gives the President the responsibility to "take care that the Laws be faithfully executed." U.S. Const., art. II, sec. 1, cl. 1; art. II, sec. 3. The President delegates this power to Federal officers ("Officers of the United States") pursuant to the Appointments Clause. U.S. Const., art. II, sec. 2, cl. 2.

The Federal courts have identified a "horizontal" component of the Appointments Clause that assures that executive power is not exercised by individuals appointed by, or subservient to, another branch of government. See *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Bowsher v. Synar*, 478 U.S. 714. The Courts have also identified a "vertical" component of the Appointments Clause that protects against the delegation of Federal authority to private entities outside the constitutional framework. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

The Executive Branch has further interpreted the "Vertical" component of the Appointments Clause in OMB Circular A-76, which states that certain functions are "inherently Governmental in nature" and therefore can only be performed by Federal employees.[6] The circular goes on to specifically identify as governmental functions

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[6] OMB Circular A-76

"5. Policy. It is the policy of the United States Government to:

. . .

"activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government." The circular describes specific examples of the "act of governing," including "management of Government programs requiring value judgments", the "regulation of the use of space, oceans, navigable rivers and other natural resources", and the "conduct of foreign relations." Under each of these bases, as well as the unique Federal trust responsibility to Indian tribes, the FCC's obligation to consult with federally recognized sovereign Indian tribes with regard to federal undertakings that could affect tribal cultural and religious properties is a non-delegable "inherent Governmental" function.

Although the Advisory Council on Historic Preservation has promulgated regulations that purport to allow limited delegation by an agency to private entities "to initiate consultation" with tribes, such delegation, on its face, violates the "vertical" component of the separation of powers doctrine. Contradictorily, the ACHP regulatory process also provides that agencies that do delegate the initiation of consultation "remain responsible for their government-to-government relationship with Indian tribes." It is not possible to delegate this consultation obligation to private companies and maintain the government-to-government relationship with a tribe at the same time.

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b. Retain Governmental Functions In-House. Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.
. . .

6. Definitions. For purposes of this Circular:

e. A Governmental function is a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Services or products in support Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. Governmental functions normally fall into two categories:

> (1) The act of governing; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs."

III. COURT DECISIONS UNDER THE NATIONAL HISTORIC PRESERVATION ACT.

A review of federal court decisions brought by tribes under Section 106 of the NHPA demonstrates a pattern by federal agencies of non-compliance and an unwillingness to truly seek tribal input. *See e.g., Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995); *Attakai v. United States*, 746 F. Supp. 1395 (D.Ariz. 1990); *Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425 (C.D. Cal. 1985). These same cases also demonstrate how important the NHPA is to tribes to provide some modicum of protection to their sacred and cultural properties, particularly those properties located off tribal lands.

In *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995),[7] the United States Court of Appeals for the Tenth Circuit held that the U.S. Forest Service violated section 106 of NHPA by failing to properly evaluate or reasonably pursue information provided by various Pueblos regarding the Las Huertas Canyon as a traditional cultural property eligible for listing in the National Register. The Forest Service had sent letters to various local Pueblos requesting information regarding the existence and location of traditional cultural properties in the Las Huertas Canyon, and had attended various tribal council meetings to request the same information. General information was made available to the Forest Service indicating the existence of sacred ceremonial sites, but specific information was not provided largely because secrecy is often a vital aspect of these ceremonies.

The Forest Service took the position that it had made the efforts required by the regulations to identify historic properties in the canyon and that none existed. The SHPO concurred in this determination and a final agency decision was rendered.[8] The Pueblo of Sandia brought suit in federal district court, alleging, among other things, that the Forest Service failed to comply with section 106 of NHPA by failing to properly evaluate the canyon as a "traditional cultural property" eligible for listing on the National Register. The district court noted that the Forest Service "does not appear to have taken the requirements of [the NHPA] very seriously." 50 F. 3d at 858, *quoting Memorandum Opinion and Order* (April 30, 1993) at 12. Nevertheless the district court ruled in favor of the Forest Service, finding that it had made the required "good faith effort" to identify historic properties in the canyon.

The United States Court of Appeals for the Tenth Circuit reversed the district court, finding that the Forest Service violated its obligation under Section 106 by failing to adequately pursue information it had in its possession that the canyon was used by the Pueblos for religious and ceremonial purposes and contained sacred sites: "[W]e hold that the agency did not reasonably pursue the information necessary to evaluate the canyon's

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[7] Although this case was decided by the Court of Appeals in 1995, the district court case was brought earlier, and the facts complained of occurred prior to 1992 when Congress amended the NHPA to provide tribes with consultation rights (see discussion below).

[8] After the Pueblo of Sandia filed suit in federal court, the SHPO withdrew its concurrence in the Forest Service's "no adverse effects determination". There is evidence that the Forest Service withheld certain information from the SHPO.

eligibility for inclusion in the National Register." *Pueblo of Sandia*, 50 F.3d at 861. The Tenth Circuit also found that the Forest Service failed to act in good faith by withholding certain information, and by ignoring various of the section 106 procedural requirements (*e.g.*, not providing documentation to the State Historic Preservation Officer (SHPO) upon concluding that no historic properties existed until after litigation was filed by the Sandia Pueblo).

Similarly, in *Attakai v. United States*, 746 F. Supp. 1395 (D.Ariz. 1990), the United States District Court for the District of Arizona found that the Bureau of Indian Affairs (BIA) and the Department of Interior failed to adequately consider the effects of a federal undertaking on Navajo ceremonial sites located in areas no longer a part of the Navajo reservation. (The sites were located on what is now Hopi reservation land.) The district court issued a preliminary injunction enjoining further governmental activity as a violation of Section 106 of NHPA. The court held that the BIA violated Section 106 consultation requirements because it failed to consult with the Navajos. (The BIA had consulted with the Hopi Tribe but not the Navajos, apparently because the sites were not located on Navajo land.) The court emphasized that the Section 106 process depended upon proper consultation since the goal is to gather the necessary information to properly evaluate historic properties. Moreover, "the regulations clearly contemplate participation by Indian tribes regarding properties beyond their own reservations."

The *Attakai* court also held that the BIA violated Section 106 by failing to consult with the Advisory Council and the SHPO during the preliminary determination as to whether historic properties existed which were eligible for protection under Section 106. The BIA had conducted its own survey to locate historic properties and a BIA archeologist had recommended certain steps intended to avoid adverse effects on the properties located. Significantly, BIA officials testified that it was standard practice for the BIA Phoenix Office to make eligibility and adverse effects determinations under Section 106 prior to consulting with the SHPO. The court emphasized the importance of the initial identification stage of the Section 106 process. Here, however, the BIA ignored the procedures, acting "contrary to the letter and spirit of the regulations." 746 F. Supp. at 1408. The court concluded that the BIA "did not adequately take into account the effect of the undertakings on historic properties" in violation of the NHPA.

The Army Corps of Engineers (Corps) was found to have flouted Section 106 procedures in *Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425 (C.D. Cal. 1985). In *Marsh*, the district court granted the plaintiff Colorado River Indian Tribes (Tribes) an injunction against the Corps' issuance of a permit for construction along the western shore of the Colorado River in California, on land abutting property owned by the United States, administered by the Bureau of Land Management (BLM), and located near the Colorado River Indian Reservation. The BLM managed land is an archeological district with significant cultural and archeological sites. The construction involved the placement of riprap along the riverbank to stabilize the bank and establish a boundary line for a housing development.

In conducting surveys to determine if eligible historic or cultural properties existed, the Corps relied on proposed (but not yet promulgated) regulations it had adopted but which had not been approved by the Advisory Council as counterpart regulations for Section 106. These proposed regulations imposed different responsibilities on the agency depending on whether a site was listed on the National Register and those not yet listed, but potentially eligible. By doing this, the Corps was able to conduct archeological surveys in a more limited area than the section 106 regulations require and the Corp therefore did not survey the required areas for potentially eligible historic and cultural sites. The Court emphasized that possible sites of archeological and cultural significance had subsequently been located on lands nearby the proposed development that should have been surveyed if the proper regulations had been adhered to.

In short, the court in *Marsh* concluded that the Corps "breached its responsibilities under NHPA", and violated Section 106 by failing to properly evaluate ceremonial sites of the Colorado River Indian Tribes as eligible properties entitled to protection under Section 106. 605 F. Supp. at 1438.

All of the above cases were brought by tribes who claimed an interest in traditional cultural sites located off tribal lands. They were all brought prior to the time that Congress amended the NHPA to statutorily impose an affirmative obligation on federal agencies engaged in the Section 106 consultation process to "consult" with "any Indian tribe or Native American Organization"

IV. DETAILED REVIEW OF THE DRAFT NATIONWIDE PROGRAMMATIC AGREEMENT

Set forth below is a section-by-section review of the draft NPA. The section headings are keyed to the section headings in the draft NPA (Appendix A).

INTRODUCTION
WHEREAS CLAUSES

The "Whereas" clauses, with regard to tribal issues, have, with a few exceptions, been substantially improved from earlier versions by the inclusion of several clauses (15th through the 21st) that address basic principles of Federal Indian law, as well as FCC policy with regard to tribes and Section 106 consultation. These clauses serve an important function in terms of framing what follows and educating all the parties to the unique status and role of tribes in this process.

Fourth "Whereas" Clause – Environmental Issues. The fourth "Whereas" clause, which concerns environmental issues, appropriately includes a reference to "properties of religious and cultural importance to an Indian tribe or Native Hawaiian organization…." It would be beneficial, however, to also note that FCC environmental regulations list "Indian religious sites" (47 CFR 1.1307(a)(5)) as a category separate from National Register Sites, providing

another basis for consulting with Indian tribes. Although this particular regulation is not a Section 106 requirement, parties should be aware of the potential efficiency of working with Indian tribes to satisfy two federal requirements to consult with tribes. See also Section I.E. of the draft NPA, whichnotes that the FCC environmental review requirements are separate from Section 106 review (See 47 C.F.R. Sections 1.1301-1.1319). USET recommends language in either the fourth "Whereas" clause, or in Section I.E. alerting parties to the separate environmental requirement to consult with Indian tribes.

Ninth "Whereas" Clause - Collocation Agreement. From the tribal perspective, the Collocation Agreement, which is incorporated by reference into the Nationwide Programmatic Agreement, was adopted without proper tribal consultation as mandated by law, and is, therefore, of suspect legality. The National Association of Tribal Historic Preservation Officers (NATHPO) formally objected to the Collocation Agreement on this basis. Notably, former FCC Commissioner Tristani was quoted in the March 19, 2001 issue of *Communications Daily* as expressing concern that the agreement fell short of the FCC's obligation to facilitate tribal consultation. She stated that "[t]he overwhelming majority [of tribal comments] told us our approach is not working. This response is prima facie evidence that our understanding of tribal consultation is misguided." USET recognizes that the FCC has made substantial improvements in its consultation with tribes since implementation of the Collocation Agreement. However, these recent improvements do not retroactively correct the earlier and fundamentally flawed process that resulted in the development of the Collocation Agreement.

15th "Whereas" Clause – Federal Consultation Obligation. The 15th "Whereas" clause sets forth the Federal government's mandate to consult with tribes pursuant to Section 101(d)(6) of the National Historic Preservation Act. USET views the draft NPA through the lens of this provision in the law. Section 101(d)(6) permits no exception and no watering down. .

16th "Whereas" Clause – Indian Policy Statement. The 16th "Whereas" clause, which sets forth the FCC's "Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes," provides an excellent summary of the unique status of Indian tribes, and the FCC's commitment to recognizing that status, including its fiduciary obligations to tribes. The FCC's commitment in the policy statement that it will "endeavor to identify innovative mechanisms to facilitate tribal consultations in the Commission's regulatory processes; and endeavors to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian tribes," is of particular relevance given the innovative approach USET has recommended in Alternative B of Part IV.

17th "Whereas" Clause – Non Delegation. The 17th "Whereas" clause is an express statement that the Commission "does not delegate" its responsibilities to Indian tribes under this agreement, including the obligation to consult pursuant to Section 101(d)(6) of the NHPA. USET applauds the inclusion of this statement

which, as described above, is consistent with USET's view that, as a matter of law, the FCC cannot delegate these responsibilities to private entities. However, USET remains concerned that certain provisions in the draft NPA, particularly Alternative A in Part IV may, in fact, if not in language, amount to a delegation of the consultation obligation and would, therefore, be a violation of Federal law.

18th "Whereas" Clause – Commission Consultation Right. The 18th "Whereas" clause provides a clear statement of the rights of Indian tribes to consult directly with the Commission. Such consultation is a core component of the unique government-to-government relationship between the United States and Indian tribes.

19th and 20th "Whereas" clauses – Council Involvement. The 19th and 20th "Whereas" clauses recognize an important component of the Advisory Council's Section 106 regulations, which is that tribes can request Council involvement at any time in the Section 106 process.

21st "Whereas" Clause – Qualified Professionals. The 21st "Whereas" clause notes that the use of "qualified professionals" by Applicants can streamline the review process. This is absolutely true when it comes to working on tribal sacred sites. Generally, a tribe is the only "qualified professional" when it comes to identifying and evaluating the significance of tribal properties of religious and cultural significance. Use of tribal experts and, in certain cases other experts recommended and trusted by tribes, will enormously speed the tribal component of Section 106 review. Of course, like other "qualified professionals," Indian tribes expect appropriate compensation for the professional services and unique expertise they provide to Applicants.

I. APPLICABILITY AND SCOPE OF THIS NATIONWIDE AGREEMENT

I.B. This section is extremely misleading when it states that the "Commission has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA." Congress made the initial determination of what activities constitute Undertakings when it defined "Undertaking" in the law **(**16 U.S.C. 470w(7)**),** a definition that is repeated in the Advisory Council regulations (36 CFR Section 800.16(y)). Ultimately, the courts are the final authority on Congress' intent. This assertion of Commission authority should be stricken from the draft NPA.

I.C. The Collocation Agreement, referred to in this paragraph, was adopted without proper consultation with Indian tribes and, as such, is of dubious legality.

I.D. The definition of "tribal lands" in this section should be written to reflect a clearer understanding of what "tribal lands" actually means. Although

the definition tracks both the law and Advisory Council regulations, it is confusingly written and not very accurate in describing actual tribal lands. For example, there are substantial tribal lands in trust status that are not within the boundaries of an established Indian reservation and are not dependent Indian communities. The Office of the Solicitor at the Department of the Interior, in a memorandum dated November 6, 2002 ("Request for Opinion regarding National Historic Preservation Act of 1966, as Amended") discussed this issue and set forth a rationale for a clearer interpretation of "tribal lands." The Office of the Solicitor concluded that "if land is within the exterior boundaries of a reservation . . . or if land is held in trust for the tribe by the United States, then the land falls within the definition of "tribal lands" for the purposes of NHPA." The Office of the Solicitor's memorandum is set forth in its entirety in footnote 9, below. For the sake of clarity, USET urges the FCC to incorporate this definition into the draft NPA to prevent confusion over the status of tribal trust lands that are not within reservation boundaries.[9]

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UNITED STATES DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington, DC 20240
November 6, 2002

To: Associate Director, Cultural Resources, National Park Service
From: Assistant Solicitor, Branch of National Parks
Subject: Request for Opinion regarding National Historic Preservation Act of 1966, as Amended

You have requested our opinion regarding lands that are appropriate for tribal administration pursuant to section 101(d)(2) of the National Historic Preservation Act of 1966, as amended, (the NHPA), 16 U.S.C. Section 470. Based on our discussions with your staff and attorneys from the Division of Indian Affairs, we understand your inquiry to concern the scope of lands that fall within the definition of "tribal lands" as described in Section 301(14) of the NHPA, 16 U.S.C. Section 470w(14). In this regard, we conclude that if land is within the exterior boundaries of a reservation, as described below, or if land is held in trust for the tribe by the United States, then the land falls within the definition of "tribal lands" for purposes of the NHPA.

Discussion

The NHPA allows tribes to assume some or all of the responsibilities of a State Historic Preservation Officer on "tribal lands." 16 U.S.C. Section 4780a(d). "Tribal lands" are defined in the NHPA as "(a) all lands within the exterior boundaries of any Indian reservation, and (b) all dependent Indian communities." 16 U.S.C Section 470w(14). Determinations as to whether land is either an Indian reservation or a dependent Indian community may be fact intensive.

There are three types of Indian reservations: (i) those created by treaties prior to 1871, (ii) those created by acts of Congress since 1871, and (iii) those made by executive orders whereby the President sets apart public lands for the use of the Indians. Federal Indian Law, 1958, at 601. There is no magic in the word "reservation," and as such, that term may not appear in the documents described above. However, the United States generally holds the title in trust to the

I.D. Definition of THPO. This section provides that the definition of THPO includes, when a tribe does not have a THPO but has elected to apply the NPA to its tribal lands, the tribe's authorized representative. This definitional nuance closes a loophole, but may be confusing in practice to Applicants seeking to follow the NPA. USET recommends that "Tribal Representative" be added to

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lands described, and the right of use and occupancy is in the Indian tribe. United States v. McGowan, 302 U.S. 535 (1938, rev'g 89 F.2d 201 (1937), aff'g sub nom U.S. v. One Cheverolet Sedan, 16 F. Supp. 453 (1936). It should be noted that in certain cases, the exterior boundaries of a reservation may include land that is not held in trust by the United States for a tribe.

The term "dependent Indian communities" refers to "a limited category on Indian lands that are neither reservations nor allotments (lands in which title is held by the United States, with the entire beneficial interest being held by the Individual allottees, but not by the tribe), and that satisfy two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 527 (1998). The Federal set-aside requirement ensures that the land is occupied by an Indian community, and the superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question. Id., at 531. However, dependent Indian communities do not include "any land owned by a federally recognized tribe," the position asserted by the Tribe to the Supreme Court. Id.

Based on these definitions, for purposes of the NHPA, the NPS should consider whether the lands in question have been set aside by the Federal Government for an Indian tribe. First, the NPS should consider if the lands are within the boundaries of an Indian reservation, which are lands set aside for a tribe as described above. Note that there may be certain lands within the exterior boundaries of a reservation that are not held in trust for a tribe. Second, for lands not within the boundaries of a reservation, the NPS should consider if the lands are dependent Indian communities, which also are lands set aside for a tribe. Lands that are held in trust by the United States for a tribe are lands that have been set aside for a tribe. Therefore, for lands not within the boundaries of a reservation, if the lands are held in trust for a tribe, they will be considered dependent Indian communities for purposes of the NHPA. The NPS should make both inquiries in establishing whether the lands fall within the definition of "tribal lands" under the NHPA.

Finally, we note that the definition of "tribal lands" contained in the NHPA is similar to the often referred to definition of "Indian Country." The term "Indian Country" includes dependent Indian communities and Indian reservations; however, it also includes "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. Section 1151. The legislative history of the NHPA does not discuss why the definition of "tribal lands" does not include "all Indian allotments." However, allotments are lands in which title is held by the U.S., with the entire beneficial interest being held by the individual allottees, not by the tribe. U.S. v. Pelican, 232 U.S. 442, 449 (1914). Thus, any Indian allotments outside the boundaries of an Indian reservation or a dependent Indian community would not fall within the definition of "tribal lands" for the purposes of the NHPA.
cc: Assistant Solicitor, Environmental, Land & Minerals, DIA

"SHPO/THPO" throughout the draft NPA (i.e., "SHPO/THPO/Tribal Representative") so that there is no confusion in cases involving tribes that do not have THPOs (less than 5% of tribes have THPOs).

PART II. DEFINITIONS

A. 3. Area of Potential Effects. As described at length in USET's comment below on Part VI.B., this definition is significantly narrower than that in the Advisory Council regulations and is, therefore, unlawful. The full Advisory Council definition should be set forth here.

A.8. Historic Property. This definition closely tracks the definition in the Advisory Council on Historic Preservation regulations. However, there is a missing "and" in the last sentence which, although it reads better than the Advisory Council language and makes no difference in meaning, you may want to consider changing for accuracy's sake.

PART III. UNDERTAKINGS EXCLUDED FROM SECTION 106 REVIEW

USET believes that, as applied to Indian tribes, the exclusions set forth in this section are illegal. The NHPA states that federal agencies "shall consult with any Indian tribe and Native Hawaiian organization that attaches religious or cultural significance" to properties that might be affected by a federal undertaking. 16 U.S.C. Section 470a(d)(6)(B) (emphasis added). This language is a mandate and admits of no exceptions.

The rationale for the exclusions, as explained to USET, is an advance determination that there is a "de minimus" possibility of an adverse impact in the excluded areas. USET finds this assertion incredible. For example, Section III.A.5. would exclude from review land within 200 feet of the outer boundary of rights of way for transmission lines (themselves as much as 200 feet wide), Interstate highways and railway corridors. These are huge swaths of land that, in many cases, have been built, not coincidentally, on top of ancient Indian trails and trade routes, frequently crossing areas of dense Indian habitation. The European explorers, contrary to their own myth, did not "discover" an untamed wilderness. Millions of Indians lived within the continental United States in 1492, when Columbus sailed the ocean blue. They had developed complex societies and complex economies. They developed substantially and heavily traveled trade routes. These routes tended to follow natural geographic features (flat lands, mountain passes, along rivers, etc.). The earlier settlers took advantage of the existing trails and, over the years, built thereon the vary transportation routes which are now the basis of this exclusion.

Several of the exclusions assume that once an area has been disturbed, further disturbance does not make any difference. This is patently not true.

Additional activity can cause further disturbance. One tower on a sacred mountain is disruptive. Two towers are more so. USET has discussed this matter with its member tribes and has learned that in many cases the construction of railroad tracks and roads often involves building up areas and this activity has actually resulted in the encapsulation and therefore protection of tribal sites. The Narragansett Tribe reports that they frequently uncover areas of cultural and religious importance to them in railroad embankments and beds. The Historic Preservation Officer for the Mississippi Choctaw, Kenneth H. Carleton, reports a situation in Mississippi where an old railroad grade protected an extensive prehistoric cemetery that included over 100 burials. In these cases, subsequent development could destroy what has, serendipitously, been protected.

The exclusions are motivated by the communication industry's desire to speed its construction process. USET wants industry to achieve its goals, but not at the expense of tribal sacred sites, or fundamental principles in the NHPA. The exclusions should not apply to tribes. Over the years, tribes have been frequently told that a federal policy will have a "de minimus" or even positive impact on tribes. Frequently, as in this case, the policy greatly benefits non-Indian interests. Only later does it become clear that tribes have sacrificed greatly for nothing in return.

Although USET opposes the exclusions as unlawful when applied to tribal interests, we do have additional comments, set forth below, regarding the rationale for particular exclusions.

Section III.A.2. This exception would permit boundary expansion by 30 feet. This seems small, but could still destroy sites. For example, an 18th century traditional Choctaw house site is usually only about 30 feet across. Expansion of a tower site by 30 feet, where there has been no Phase I archaeological survey, could totally destroy such a site. This exclusion should only apply to tower sites which have had a full Phase I archaeological survey covering the entire area where construction or other disturbance will occur and have had tribal review.

Section III.A.3.a and e. Although we understand the policy behind temporary or emergency exclusion, USET has several concerns. If a tower is needed for an emergency situation there are provisions for such in the Advisory Council regulations that provide a detailed process that involves all the interested parties. 36 CFR 800.12. The process in the draft NPA, by contrast is inadequate and does not meet the requirements of the NHPA. USET requests that the Advisory Council regulatory process be retained in the NPA. If an actual *tower* is constructed, no matter how temporary it might be in circumstances that are not an emergency, the potential damage done by its construction is the same as any other tower construction and should therefore not be exempted from Section 106 review where archaeological resources are concerned. Its effect on standing structures may be temporary and therefore exemptible but if an archaeological resource is present, the damage its construction will do is permanent and irreversible. At the very least there should be a requirement that, where practical,

in emergency situations consideration shall be given to Historic Properties and tribal interests.

As for an experimental authorization, we see no basis for this exclusion at all.

III.A.5. Footnote 5 – Opt Out. The SHPOS have sought an "opt-out" provision to III.A.5. USET supports the SHPO's request and believes such an opt-out should be available to all interested parties. Potentially, an opt-out provision for tribes to all of the exclusions would address USET's concerns that the law does not authorize exclusions to its mandatory tribal consultation provisions.

III.A.6. This exclusion should not only require consultation with appropriate tribes, but also the agreement of those tribes. Otherwise, this would be a direct violation of the NHPA's tribal consultation mandate.

III.B. – Tribal Notice Exception. The Navajo Nation has proposed a tribal notice provision when an Undertaking is to occur in one of the excluded areas, with an opportunity to invoke the provisions of Part IV of the NPA. USET believes that this provision is very positive and may be a satisfactory middle ground. USET cannot imagine anything less than this provision surviving legal challenge. This provision represents the absolute minimum acceptable standard from a tribal perspective. Few, if any of the excluded areas have had any input from tribes in their construction in the past, therefore it is necessary that tribes have input into their potential further disturbance in the future.

We would like to emphasize that the Advisory Council on Historic Preservation's comment in this section, that other programmatic agreements have excluded from review Undertakings off tribal lands without a provision for tribal notice, only demonstrates how little consultation there has been with tribes. USET would never support blanket exclusions without tribes at least receiving notice and an opportunity to be consulted. The fact that tribes have not had a full seat at the table during the consideration of other programmatic agreements should not now become the basis for dismissing tribal concerns out of hand.

A review of the Advisory Council's own guidance document on consultation with Indian tribes ("Consulting with Indian Tribes in the Section 106 Review Process) addresses the issue of consultation off tribal lands:

> **"Consultation with Indian Tribes for Undertakings off Tribal Lands**
> **1. Initiation of the Section 106 Process**
> **If the undertaking will not occur on or affect historic properties on tribal lands, is the Federal agency required to consult with Indian tribes?**
> Yes, Section 101(d)(6)(B) of NHPA requires consultation with Indian tribes that attach religious and cultural significance to historic properties

(hereinafter "relevant Indian tribes"). The Federal agency must make a reasonable and good faith effort to identify such Indian tribes and invite them to be consulting parties. . . ."

This document can be found on the Advisory Council's website (www.achp.gov). Notably, it does not contemplate exclusions or exceptions to the Congressionally mandated tribal consultation requirement.

PART IV. PARTICIPATION OF INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS IN UNDERTAKING OFF TRIBAL LANDS; TRIBAL CONSULTATION

ALTERNATIVE A -- IV. A. USET opposes Alternative A. The National Historic Preservation Act does not permit the Commission, as this section provides, to have "authorized Applicants to initiate contacts with Indian tribes and NHOs on its behalf, and to conclude the process of tribal participation consistent with this Agreement where the tribe has not requested government-to-government consultation." Applicants cannot act *on behalf of* the FCC with regard to the FCC's obligations to consult with Indian tribes.

In other parts of the draft NPA, the FCC specifically acknowledges that it cannot and is not delegating any of its responsibilities to Indian tribes. Although the term "delegate" is not used in this section, the term "authorized" amounts to essentially the same thing. USET considers this provision illegal under the NHPA and other Federal laws as set forth above. The attempt to save this provision by stating that this only applies where a tribe has not requested government-to-government consultation is meaningless. The law requires the FCC to consult. The only possible exception to this is where a tribe has said that no consultation is necessary, which is exactly the approach taken in USET's proposed Alternative B, described below.

Part IV. Footnote 6. This footnote misleadingly implies that tribal representatives in the Telecommunications Working Group support Alternative A. USET has spoken with all of the few tribal representatives who participated in the Working Group. They have universally stated that tribal participation was minimal and tribal suggestions routinely disregarded.

ALTERNATIVE A – IV. J. Confidentiality is of central importance to tribes. This provision should be revised to provide that confidentiality restrictions are in place on Applicants whether or not a tribe or NHO has requested confidentiality. As this provision is a part of Alternative A, which USET opposes, the confidentiality restriction should be moved elsewhere in the document and generally applied to all parties who have access to tribal materials or information.

PART IV - ALTERNATIVE B.

Alternative B was developed by USET, in discussion with several non-USET tribes. It provides a simple, straightforward process that complies with the law in every detail and, with regard to tribal sacred sites, recognizes the extreme importance of these sites to tribes, the unique expertise of tribes in identifying and evaluating these sites, and the unique status of tribes under the law.

The FCC's commitment in its policy statement that it will "endeavor to identify innovative mechanisms to facilitate tribal consultations in the Commission's regulatory processes; and endeavors to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian tribes," is of particular relevance given the innovative approach USET has recommended in Alternative B.

ALTERNATIVE B -- IV.A. This section of Alternative B repeats the fundamental requirement of the NHPA – that it is the FCC's obligation to consult with tribes that attach religious and cultural significance to a Historic Property if the property may be affected by a Commission undertaking.

ALTERNATIVE B -- IV.B. This section provides that the Commission shall engage in direct and meaningful consultation, but also provides an exception, set forth in IV. C., which is intended to provide a reasonable solution to the practical difficulty of the FCC carrying out its consultation obligation.

ALTERNATIVE B -- IV. C. This paragraph sets forth the USET-supported exception to Commission consultation with Indian tribes. The exception is based on the fact that tribes have a right to such consultation but, under appropriate circumstances, can waive that right. An Applicant, working with interested tribes, will have an opportunity to secure letters of certification from the tribes that waive the FCC's consultation obligation. This approach has the potential to tremendously speed the review process. It also will alleviate most, if not all, of the FCC's consultation obligation. Under this approach, tribes would be making a substantial concession. They choose not to exercise a consultation right in return for a working relationship with Industry that should result in the protection of sacred sites and a speedier Section 106 review process for Applicants.

USET believes that industry opposition to this proposal is based on an unjustified fear that tribes will be obstructionist. When tribes are treated with respect, and good relationships are built based on law and professional standards, tribes are extremely cooperative partners. It is as much in the tribes' interest, as industry's to see this process work. USET is firmly committed to making Alternative B work and believes, based on discussion with non-USET tribes and tribal organizations, that others will make similar commitments.

PART V. PUBLIC PARTICIPATION AND CONSULTING PARTIES

V.C. The information that is required to be provided is inadequate. Other relevant information includes maps, coordinates, etc.

V.F. - Footnote 11. USET shares CTIA's concerns regarding confidential information and supports a confidentiality clause regarding tribal information that would be binding upon all Parties.

PART VI. IDENTIFICATION, EVALUATION AND ASSESSMENT OF EFFECTS

Selection of Experts and Consultants. The draft NPA should make clear that identification, evaluation and assessment should be done by someone who meets the Secretary of Interior's standards. The USET tribes would be willing to provide a list of tribally approved archaeologists. These are individuals who we know have the necessary expertise. The draft NPA should make clear that for tribal properties, only tribes possess the expertise to evaluate a sites cultural and religious significance to them and what impact a possible Facility might have on their interest in that site.

At times, cell tower companies have suggested that their responsibility could be simplified by simply ceasing construction when an Historic Property is encountered and reporting the discovery to the interested parties. However, such discoveries are typically made by a bulldozer operator, who rarely is qualified to make archeological or historic determinations relating to sites of importance to tribes. Frankly, when one makes a discovery with a bulldozer, like discovering a burial ground, the results are disastrous and irreparable.

Cell tower companies frequently retain a consulting firm from one state, to do archeological and historic reviews in many states. This may make economic sense, however, an expert in Connecticut is not qualified to make determinations on sites in Florida.

VI.A. Consideration of Direct Effects and Visual Effects. Tribes should not be bound by SHPO determinations regarding areas which would not require review. It would make sense, however, to provide that a tribe can make such determinations as far as that tribe's own interest is concerned. USET believes that tribes should declare where their interest lies. USET supports the development of a tribal lands database to facilitate this process.

Section VI.A. refers to direct effects on "archeological resources." Are "archeological resources" the same as "Historic Properties"? If not, what distinction is intended in this section between these two terms. For example, would a mountain a tribe considered sacred, which clearly would be a Historic

Property, also be an archeological resource? USET recommends replacing "archeological resources" with "Historic Properties".

VI.B. Definition of the Area of Potential Effects. The definition of the Area of Potential Effects is narrower than that provided for in the Advisory Council's regulations (please note related discussion at Part II.A.3., above). As even the draft NPA notes (see 8th "Whereas" clause), a programmatic agreement cannot be inconsistent with the Advisory Council regulations. The Advisory Council regulations state that "Area of potential effect means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." (Emphasis added.) The Advisory Council's definition, unlike the draft NPA, specifically notes the potential for *indirect effects*. The full Advisory Council regulatory definition should be incorporated into the draft NPA. Moreover, the effect of an undertaking, and therefore the area of potential effects, should by a topic for consultation.

The visual effects requirements in this section appear to be the product of compromise, and not of a substantive rationale. Logically, in addition to the distances provided herein, the visual effect should include anywhere a Facility can be seen, no matter how distant.

VI.C.3. – Archeological Survey. A Phase I archeological survey must be conducted for every Facility. In the absence of such an archeological survey, it is impossible to determine whether there is a potential impact on a Historic Property. The cost of such a survey is not that great compared to the overall cost of a typical tower, and it is the only widely accepted way to assure adequate identification, evaluation and protection of properties of cultural and religious importance to a tribe. The only exception should be when a tribe indicates that such a survey is not necessary. In this regard, it would behoove Applicants to contact tribes prior to taking any action on a site(s). Tribes will frequently be able and willing, once a relationship has been established, to indicate areas of concern and areas where the Tribe has little or no interest. As a result, in many cases tribes may agree that no Phase I survey is necessary. However, if there has been no such advance agreement, a Phase I survey is a universally accepted way a tribe can properly evaluate its interests in a site. Tribes should always have a right to see a Phase I survey. Early contact with Tribes will greatly facilitate this process.

The standards for a Phase I archeological survey should be spelled out, as this term apparently does not have universal acceptance. From USET's perspective, a Phase I survey is an on-the-ground assessment, including shovel tests (except where in the opinion of a qualified expert, as defined above, shovel tests are not indicated), and not just a literature review.

VI.C.4. The two-foot provision in this section is not deep enough. It is not uncommon to find sites that are buried under three or more feet of sediment or over-burden. This problem would be addressed, however, by requiring a Phase I archeological survey. Otherwise, how is anyone supposed to know if a site has been disturbed to this depth? This is not something that can be assumed just because there is old construction in the area! This provision also affects Section III.A.4. and Section III.A.5.

VI.E.4. This provision should not apply to tribes, as tribes were not consulted with the establishment of nearly all existing towers and therefore there is no reasonable expectation that tribal concerns were addressed in the initial construction. As noted elsewhere, the Collocation Agreement was adopted with insufficient tribal consultation in violation of the law.

VII.A.3. The five-day comment period is too short. In this situation, at least 30 days should be permitted for such review.

VII. A. 4. Consulting parties, including Indian tribes, should also be able to challenge the sufficiency of an Applicant's Submission Packet.

VII.B. – Deadlines. USET supports reasonable deadlines. However, the huge backlog of letters tribes have received cannot possibly be processed within the time frames given here and in other sections of the draft NPA.

VII.C.2. The presumption in this paragraph is not fair if tribes have not had a chance to work through the backlog of letters.

VII.C.5. - Footnote 16. USET reiterates its support for the word "shall."

VII.C.6. This section seems to contemplate a situation where a potential adverse effect is avoided by imposing certain conditions. Potentially, this is really a way of mitigating an adverse effect, in which case it is necessary to have a memorandum of agreement.

X.D. If there is a probable violation of Section 110(k), this paragraph should indicate that one of the options is not just a memorandum of agreement resolving adverse effects, but an enforcement action against the violating party. Although enforcement actions are mentioned in the next paragraph, it is odd that this paragraph, which directly refers to an intentionally harmful violation, only mentions a memorandum of agreement. This language must be stronger to discourage Applicants from deciding to take a chance and building without proper consultation, even if an adverse affect on an Historic Property is a real possibility.

Signatories. If the final Agreement is satisfactory, USET and its member tribes may be interested in joining as signatories. Signatory Tribes should be allowed to propose amendments and participate in the annual review process. Certainly, participating in the annual review process is the minimum due tribes

consistent with the government-to-government relationship and the Federal trust responsibility.

Retroactive Application. As literally tens of thousands of towers have been constructed without proper consultation with tribes, USET believes that the NPA should apply to any Facility that has not yet been built or licensed. In addition, USET believes that a provision should be added to the draft NPA that permits a retroactive review of Facilities that have already been constructed, but not been subject to proper tribal review, to determine if they adversely impact a property of cultural and religious importance to an Indian tribe. For those that do, this provision should require a mitigation plan. The rationale for this provision is that just because such towers were constructed without complying with the law should not mean that they get grandfathered in if they do, in fact, adversely impact a property of cultural and religious importance to a tribe.

Attachment 2. This attachment is helpful as an illustrative list. However, we would like to draw to the FCC's attention our comments with regard to Section I.B. above, regarding the Commission's authority to determine what constitutes an "Undertaking."

CONCLUSION

For more than a decade, the FCC has not complied with its tribal consultation obligations under the National Historic Preservation Act and the Federal trust responsibility to tribes. In recent years, it has effectively sought to delegate those obligations to the cell tower companies, who have little understanding of tribal sovereignty. The cell tower companies have sought the unique expertise of tribes in the evaluation of sites for commercial cell towers, but have been unwilling generally to cover the costs associated with using that expertise. The result is an untenable situation where tribal rights have been trampled upon and tribal cultural and religious properties endangered. The draft NPA has the potential to correct this situation if full consideration is given to the positions USET has set forth in this comment document.